

Gender Based Asylum Claims

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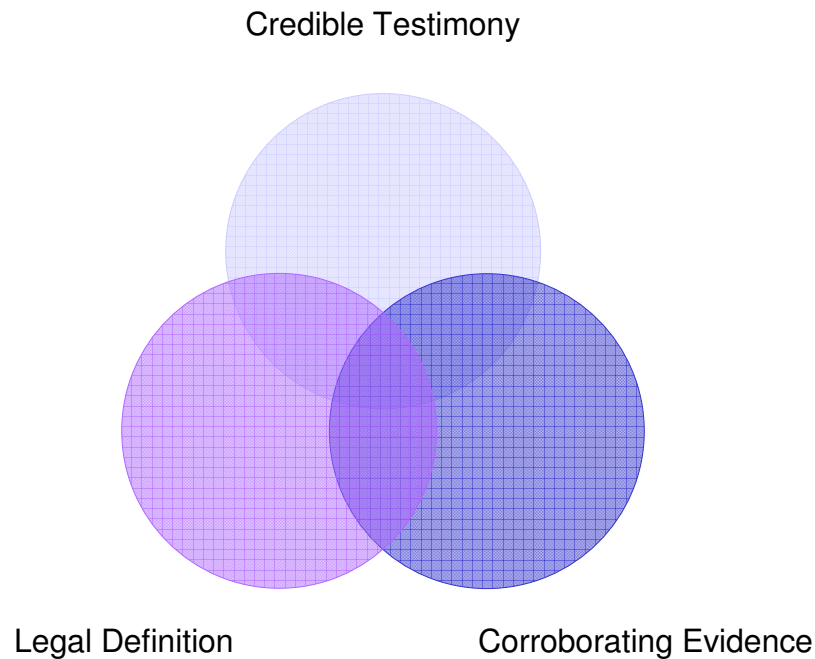
Overview

- A. Review of Asylum Definition & Elements
- B. Types of Gender Based Claims
- C. Domestic Violence Claims & Matter of R-A-
 - I. How to create the social group
- D. FGM Claims & Hassan v. Gonzales
 - I. Fear of future FGM
 - 2. Past FGM experience
 - 3. Fear of FGM for children
- E. Other Gender Based Claims

Elements of the Refugee Definition

- Outside country of nationality
- Well-founded fear - subjective and objective
- Past persecution/future persecution
- On account of race, religion, nationality, political opinion or membership in a particular social group
- Unwilling to return because unable to get protection from home country government

Essential Elements of Proving an Asylum Claim



- Credible testimony alone can be sufficient
- All reasonably available corroborating evidence
 - Affidavit
 - Human rights reports
 - Primary evidence
 - Evidence of filing within 1 year of last arrival
- Burden of proof on applicant; must prove all issues:
 - Identity
 - Nationality
 - Ground for asylum
 - Persecution

How does Gender come into play?

- Gender not an enumerated ground
 - Membership in a particular social group
 - Political Opinion
 - Religion
- Examples of Gender based claims:
 - Domestic Violence
 - FGM
 - Forced Marriage
 - Women's Rights
 - Honor Killings

Domestic Violence & Asylum

- On account of membership in a particular social group – varying ways to define social group
- Abuser typically non-governmental actor; must show government will not/cannot protect
- Have suffered or will suffer persecution – must document physical or psychological effects of abuse, at a minimum through testimony

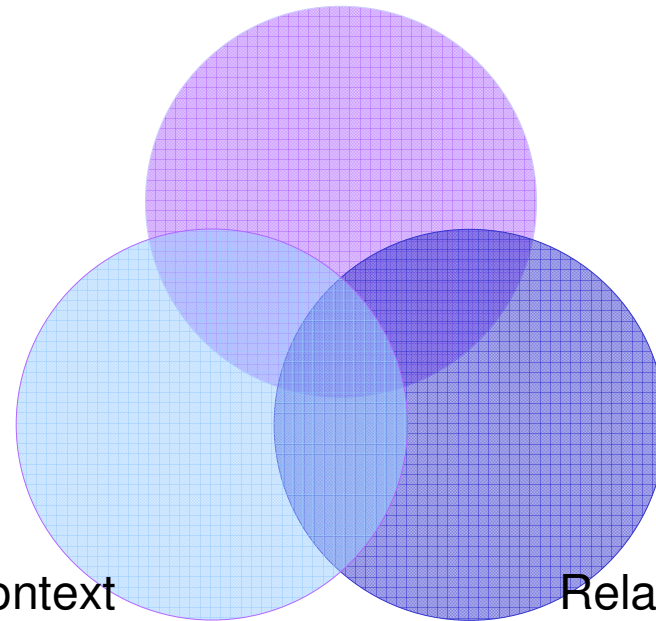
Membership in a Particular Social Group

“[A] group of persons all of whom share a common, immutable characteristic . . . [I]t must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”

Matter of Acosta, 19 I&N Dec. 211 (BIA 1985)

Diagram of a DV social group

Women



Guatemalan – social context

Relationship Status - Married

“Married women in Guatemala who are unable to leave the relationship.”

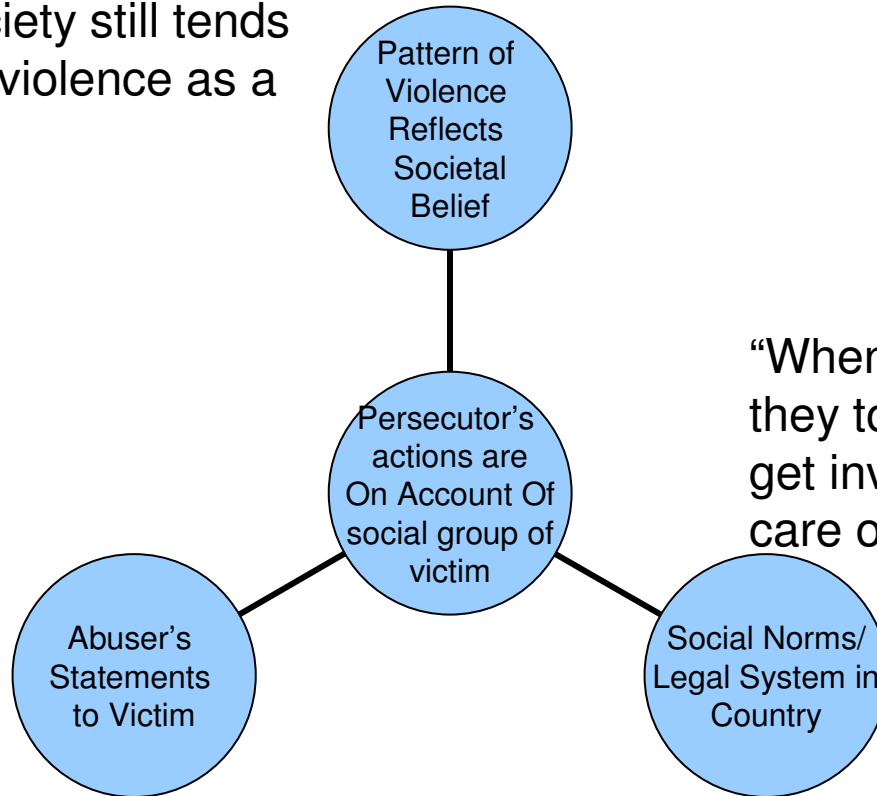
Domestic Violence as Social Group

- A. Specific characteristic persecutor targets
 - 1. Not gender alone – status as wife (or domestic partner) results in greater subordination
- B. Immutability of status
 - 1. Marital status as unchangeable due to religious, cultural or legal constraints
 - 2. Country context – given the social, political, historical setting is it possible to change status?
- C. Cannot be defined by persecution suffered.

Source: http://cgrs.uchastings.edu/documents/legal/dhs_brief_ra.pdf &
<http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf>

“On Account of”

“Guatemalan Society still tends to view domestic violence as a family matter.”



“When I tried to get help, they told me they would not get involved, I should take care of it at home.”

“I can do it if I want to”

“You’re my woman and I can do whatever I want”

Establishing Persecution

- Past or Future
 - Shifting burden of proof
- Defined as:

“The infliction or threat of death, torture or injury to one’s person or freedom”
- Examples of evidence:
 - Physical scars
 - Psychological
 - Witnesses

Availability of Government Protection

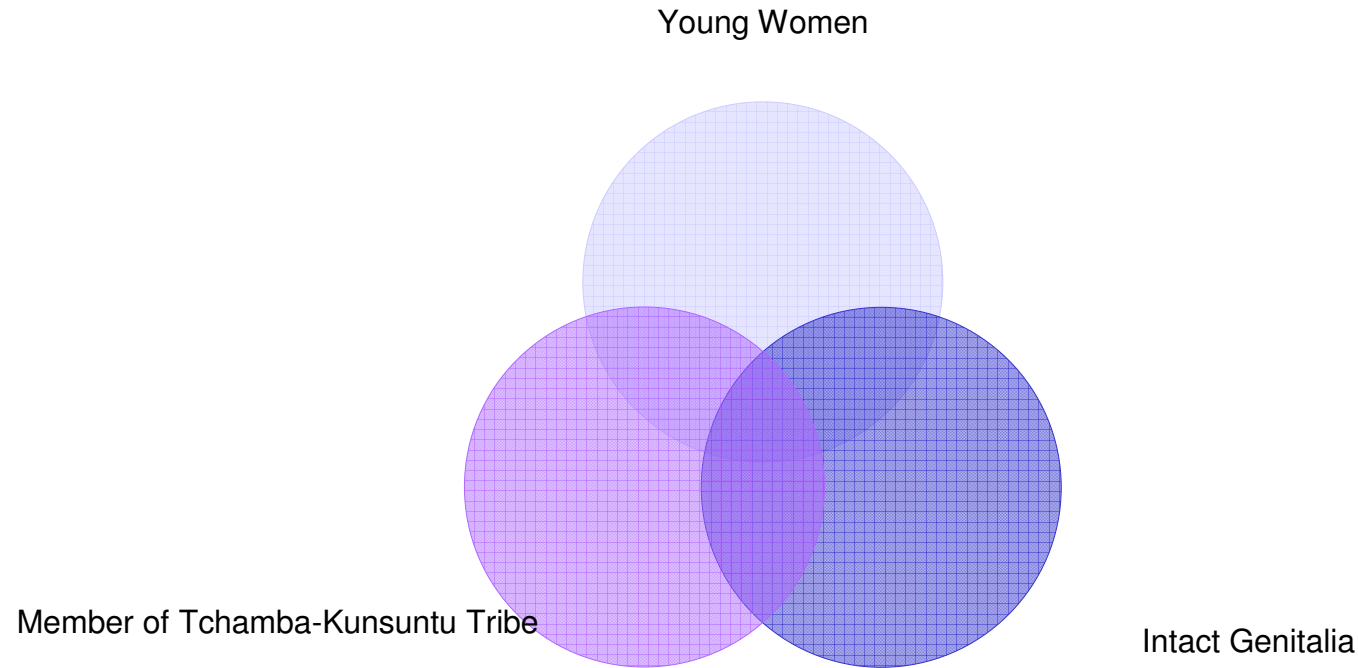
- Non-governmental actor whom government is unwilling or unable to control
 - Does gov't take reasonable, effective steps to control?
 - Does applicant have access to gov't protection?
- Must demonstrate no ability for internal flight
 - What factors consider for internal relocation?
- Government/government actor
 - What about persecutor who is police officer, military officer, or government employee?

FGM Claims – Looking Forward

Matter of Kasinga, 21 I&N Dec. 357 (BIA 1996)

- Intent of persecutor does not need to be punitive or malignant
- FGM is persecution due to the severity of the harm.
- “On Account of” – FGM is designed to control women’s sexuality and assure male dominance and exploitation.
- No internal relocation possible
- Country conditions matter

FGM Social Group - *Kasinga*



Social Group: "Young women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation, as practiced by that tribe, and who oppose the practice, are recognized as members of a "particular social group"

FGM Claims – Past FGM

Matter of A-T-, 25 I&N Dec. 4 (B.I.A. 2009)

- Past FGM is persecution, burden shifts to government to show no future harm.
- A.G. says: “law only required that once past persecution on account of an enumerated ground was shown, a presumption was triggered that there would be a threat to life or freedom “on the basis of the original claim”—in other words, on account of the same statutory ground.”

Note: A-T- also has a one year deadline issue which raises difference between “more likely than not” standard for Withholding v. lower standard for Asylum.

FGM Claims – Past FGM & Somalia

Hassan v. Gonzales 484 F.3d 513 (8th Cir. 2007)

- Past FGM is persecution so burden shifts to government.
- Future fear does not have to rely on exact same harm. Court notes in footnote 2 the abysmal situation for women in Somalia, particularly the prevalence of rape.

Matter of S-A-K- and H-A-H-, 24 I&N Dec. 464 (BIA 2008)

- Granting asylum on humanitarian grounds (*Matter of Chen*) due to the severity of the past FGM and ongoing effects.

Fear of FGM for Child

Matter of A-K-, 24 I&N Dec. 275 (BIA 2007)

- Citizenship of children matters (USC children)
- Presence & status of other parent matters (other parent present and not in removal proceedings)
- Harm potentially suffered by parent opposing did not rise to level of persecution (humiliation, not a beating)
- Withholding of Removal claim

Abay v. Ashcroft, 368 F.3d 634 (6th Cir. 2004)

- Can consider psychological suffering of parent if child subjected to FGM

Other gender based claims

- Forced Marriage
- Honor Killing
- LGBT

Resource: Center for Gender & Refugee Studies, University of California Hastings School of Law <http://cgrs.uchastings.edu>.

Filing Deadline

Asylum application filed within one year of entry.

Exceptions:

1. Exceptional circumstances – must occur during first year (medical, valid status)
2. Changed circumstances – country conditions or personal (birth of child, for example) such that would not have had reason to apply before

Bars to Asylum

- Persecutor of others
- Firmly resettled
- Previously denied asylum by IJ/BIA
- Failed to apply within 1 year of arrival in US
- Convicted of aggravated felony/particularly serious crime
- Danger to security of US
- Serious nonpolitical crime outside the United States
- Terrorist activities or material support of terrorism

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